Bank Bumiputra (M) Bhd v Hashbudin bin Hashim

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-12-96 OF 1997
NIK HASHIM J
14 APRIL 1998

Banking *— Banks and banking business — Payment of cheque — Countermanded cheque — Whether bank can recover payment mistakenly made on countermanded cheque — Whether recipient of payment obliged to refund on the basis of s 73 of the Contracts Act 1950 or money had and received*

Contract *— Mistake — Mistake of fact — Payment mistakenly made on countermanded cheque — Whether bank may recover payment — Whether recipient of payment obliged to refund — Contracts Act 1950 s 73*

The appellant in this case, Bank Bumiputra (M) Bhd ('the bank'), claimed against the respondent for the return of the sum of RM25,000 in respect of the payment of a cheque BBMB No 023688 dated 5 December 1992 ('the cheque') in the name of the respondent, the payment of which had been countermanded by the customer of the bank ('the customer') before the payment. On 4 December 1992, the customer called the bank by telephone and instructed its relief deputy manager to stop payment of the cheque and a few other cheques. On 9 December 1992, the respondent presented the cheque at his bank. The cheque was cleared on 10 December 1992 and the respondent admitted receiving the payment of RM25,000 from the bank. It was not in dispute that the respondent had been asked by the customer not to present the cheque for payment. Prior to the commencement of the action, the bank had made several attempts to recover the payment from the respondent but the respondent had refused to refund the money, claiming that he was entitled to the money from the customer. The bank's causes of action against the respondent were based on: (a) s 73 of the Contracts Act 1950 ('the Act'); and/or (b) money had and received. At the sessions court, it was found that the countermand instruction had been entered into the bank's computer system and the customer's account had insufficient funds to meet the payment of the cheque. The sessions court found that the bank's teller who had cleared the cheque was negligent and decided that the case was not a mistake within the ambit of s 73 of the Act. The bank's claim was thus dismissed. In this appeal, the main ground of appeal by the bank was that the sessions court judge had erred in law in failing to apply correctly the legal principle relating to the recovery of money paid by mistake under s 73 of the Act.

Held, allowing the appeal:

(1) The dismissal of the bank's claim was wrong in law. Section 73 of the Act was applicable in this case. The trial court had accepted that there was a countermand instruction given by the customer.

That instruction was valid and effective in law, even though it was given orally. Since the countermand was validly made before the payment, the bank's payment to the respondent was without mandate. Accordingly, the bank had no recourse to its customer and the customer's debt to the respondent on the cheque was not discharged. Prima facie, the bank was entitled to recover the money from the respondent. Thus, neither the knowledge by the bank of the insufficient funds in the customer's account to cover the cheque nor the negligence of the bank in paying the cheque was a bar to the bank's claim under s 73 of the Act and under common law on the basis of money had and received (see p 270C–E); *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi & Anor* (1949–50) 75 LR 244, *The Sales Tax Officer, Banaras & Ors v Kanhaiya Lal Makhund Lal Sarat* AIR 1959 SC 135, *Kelly v Solari* [1835–42] All ER Rep 320, *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd & Anor* [1980] 1 QB 677, *Commercial Bank of Australia Ltd v Younis* and *Chua Neoh Kow v Malayan Banking Bhd* [1986] 2 MLJ 396 followed.

(2) At common law, a person should be prevented from retaining the money derived from another, the keeping of which was against conscience. In the present case, the evidence clearly showed that the respondent had received the payment of RM25,000 from the bank which was not legally due to the respondent as the cheque had been countermanded by the customer before payment. In the particular circumstances of the case, the respondent was bound by the ties of natural justice and equity to refund the money to the bank. There was no evidence to show that the respondent had altered his position in a manner rendering it inequitable that he should repay the money. He would also be unjustly enriched at the bank's expense if the bank could not recover from him (see pp 271I and 272A–D); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 followed.

[Bahasa Malaysia summary

Perayu dalam kes ini, Bank Bumiputra (M) Bhd ('bank tersebut'), menuntut terhadap penentang bagi pengembalian semula wang berjumlah RM25,000 berhubung dengan pembayaran suatu cek BBMB No 023688 bertarikh 5 Disember 1992 ('cek tersebut') atas nama penentang, pembayaran yang mana telah dibatalkan oleh pelanggan bank tersebut ('pelanggan tersebut') sebelum pembayaran itu. Pada 4 Disember 1992, pelanggan tersebut telah menelefon bank tersebut dan mengarahkan timbalan pengurus bank tersebut yang bertugas supaya menghentikan pembayaran cek tersebut dan beberapa cek yang lain. Pada 9 Disember 1992, penentang telah mengemukakan cek tersebut di banknya. Cek tersebut telah dibayar pada 10 Disember 1992 dan penentang mengakui menerima pembayaran sebanyak RM25,000 daripada bank tersebut. Tidak

dipertikaikan bahawa penentang telah diminta oleh pelanggan tersebut supaya tidak mengemukakan cek tersebut untuk pembayaran. Sebelum permulaan tindakan tersebut, bank telah membuat beberapa percubaan untuk mendapatkan semula pembayaran tersebut daripada penentang tetapi penentang telah enggan untuk membayar balik wang tersebut, dengan menuntut bahawa beliau berhak kepada wang daripada pelanggan tersebut. Kausa-kausa tindakan bank tersebut terhadap penentang adalah berdasarkan: (a) s 73 Akta Kontrak 1950 ('Akta tersebut'); dan/atau (b) wang ada dan telah diterima. Di mahkamah sesyen, telah didapati bahawa arahan pembatalan telah pun dimasukkan ke dalam sistem komputer dan akaun pelanggan tidak mempunyai wang yang secukupnya untuk memenuhi pembayaran cek tersebut. Mahkamah sesyen mendapati bahawa juruwang bank tersebut yang telah menjelaskan cek itu cuai dan telah memutuskan bahawa kes tersebut bukannya merupakan satu kesilapan dalam lingkungan s 73 Akta tersebut. Tuntutan bank tersebut telah ditolak. Dalam rayuan ini, alasan utama rayuan oleh bank tersebut adalah bahawa hakim mahkamah sesyen telah tersalah pertimbangan di sisi undang-undang dalam gagal untuk memakai secara betul prinsip sah berhubung dengan mendapatkan semula wang yang telah dibayar secara salah di bawah s 73 Akta tersebut.

Diputuskan, membenarkan rayuan:

(1) Penolakan tuntutan bank tersebut adalah salah di sisi undang-undang. Seksyen 73 Akta tersebut terpakai dalam kes ini. Mahkamah perbicaraan telah menerima bahawa terdapatnya arahan pembatalan daripada pelanggan tersebut. Arahan itu adalah sah dan berkuatkuasa di sisi undang-undang, walaupun ia telah diberikan secara lisan. Oleh kerana arahan pembatalan itu telah dibuat secara sah sebelum pembayaran tersebut, pembayaran oleh bank kepada responden adalah tanpa mandat. Sehubungan itu, bank tersebut tiada jalan lain untuk berpaling kepada pelanggannya dan hutang pelanggan tersebut kepada penentang berdasarkan cek tersebut tidak dilupuskan. Prima facie, bank tersebut berhak untuk mendapatkan semula wang tersebut daripada penentang. Dengan itu, pengetahuan bank mengenai ketidak-cukupan wang dalam akaun pelanggan untuk menjelaskan cek tersebut mahupun kecuaian bank dalam membayar cek tersebut tidak merupakan halangan kepada tuntutan bank tersebut di bawah s 73 Akta tersebut dan di bawah common law atas dasar wang yang dipunyai dan diterima (lihat ms 270C–E); *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi & Anor* (1949–50) 75 LR 244, *The Sales Tax Officer, Banaras & Ors v Kanhaiaya Lal Makhund Lal Sarat* AIR 1959 SC 135, *Kelly v Solari* [1835–42] All ER Rep 320, *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd & Anor* [1980] 1 QB 677, *Commercial Bank of Australia Ltd v Younis* dan *Chua Neoh Kow v Malayan Banking Bhd* [1986] 2 MLJ 396 diikut.

(2) Menurut common law, seseorang seharusnya dihalang daripada menyimpan wang yang diperolehi daripada pihak yang lain, penyimpanan wang yang sedemikian adalah bertentangan dengan hati nurani. Dalam kes semasa, keterangannya jelas menunjukkan bahawa penentang telah menerima pembayaran sebanyak RM25,000 daripada bank tersebut yang mana secara sahnya tidak kena dibayar kepada penentang kerana cek tersebut telah dibatalkan oleh pelanggan sebelum pembayaran. Dalam keadaan khusus kes tersebut, penentang terikat oleh ikatan keadilan asasi dan ekuiti untuk membayar balik wang tersebut kepada bank. Tidak terdapat sebarang keterangan untuk menunjukkan bahawa responden telah mengubah kedudukannya dengan cara yang menjadikannya tidak saksama bahawa beliau seharusnya membayar balik wang tersebut. Beliau juga akan secara tidak adil diperkayakan sehingga menjejaskan bank jika bank tersebut tidak dapat memperolehinya semula daripada beliau (lihat ms 271I dan 272A–D); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 diikut.]

Notes

For cases on payment of cheque, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1133–1134.

For cases on mistake of fact, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2604–2605.

Cases referred to

Barclays Bank Ltd v WJ Simmsson & Cooke (Southern) Ltd & Anor [1980] 1 QB 677 (folld)

Chua Neoh Kow v Malayan Banking Bhd [1986] 2 MLJ 396 (folld)

Commercial Bank of Australia Ltd v Younis [1979] 1 NSWLR 444 (folld)

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 (folld)

Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd (1928) 45 TLR 134 (refd)

Kelly v Solari [1835–42] All ER Rep 320 (folld)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals [1995] 2 MLJ 493 (refd)

Moses v Macferlan (1760) 2 Burr 1005 (refd)

Sales Tax Officer, The, Banaras & Ors v Kanhaiya Lal Makund Lal Sarat AIR 1959 SC 135 (folld)

Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi & Anor (1949–50) 75 LR 244 (folld)

Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investment Sdn Bhd [1996] 2 MLJ 596 (refd)

Legislation referred to

Bills of Exchange Act 1949 s 75(a)
Contracts Act 1950 s 73
Evidence Act 1950 ss 114(g), 134

Appeal from: Summons No 52–4482 of 1993 (Sessions Court, Kuala Lumpur)

Chan Chong Choon (*Skrine & Co*) for the appellant.
Arjan Persumal (*Sri Ram & Co*) for the respondent.

Cur Adv Vult

Nik Hashim J: This appeal before this court involves an important point of banking law whether a bank which pays a cheque for which it has received a valid countermand from its customer can recover the payment from the payee.

The appellant in this case is the Bank Bumiputra (M) Bhd ('the bank') whilst the respondent is the payee ('DW1'). The bank's claim against the respondent is for the return of the sum of RM25,000 together with interest and costs in respect of the payment of a cheque BBMB No 023688 dated 5 December 1992 ('the cheque') in the name of the respondent, the payment of which was countermanded by the customer ('PW4') of the bank before the payment. The cheque was a post-dated cheque issued by PW4 to the respondent along with eight other post-dated cheques, being part payment for the purchase of 90% shareholding in Nova Sante Corp Sdn Bhd ('the company') by PW4 and one Robert J Hubbard from the respondent for a total purchase consideration of RM430,000. A sum of RM100,000 had already been paid to the respondent leaving a balance sum of RM330,000 which was to be settled by way of nine monthly instalments in post-dated cheques, including the cheque. On 4 December 1992, PW4 called the bank by telephone and instructed the bank's relief deputy manager ('PW3') to stop payment of the post-dated cheques, including the cheque. On 9 December 1992 the respondent presented the cheque at his bank, Hongkong and Shanghai Banking Corp Ltd. The cheque was cleared on 10 December 1992 and the respondent admitted receiving the payment of RM25,000 from the bank. It is not in dispute that the respondent was asked by PW4 in his letter (P7) dated 5 June 1992 not to present the cheque for payment as there were several anomalies in the sale and purchase of the shares in the company. Prior to the commencement of the action, the bank had made several attempts to recover the payment from the respondent but the respondent had refused to refund the money. He claimed that he was entitled to the money from PW4, and this is what he said in his testimony at p 68 para B of record:

> Saya tidak pulangkan wang itu kepada Bank Bumiputra (M) Bhd kerana ini adalah untuk membayar hutang PW4 kepada saya dan PW4 masih lagi berhutang dengan saya hingga hari ini.

A It is significant to note that the cheque was one of the six cheques which PW4 had instructed the bank to stop payment on. Except for the cheque, the other five cheques were stopped upon presentation by the bank. The respondent subsequently filed a suit against PW4 in Kuala Lumpur High Court (Bahagian Dagang) Guaman No D2–22–1657–92 for the recovery of the money. In it, the respondent had included in the B suit the sum of RM25,000 in respect of the cheque which the respondent had received from the bank.

The bank's causes of action against the respondent are based on: (a) s 73 of the Contracts Act 1950 ('the Act'); and or (b) 'money had and received'.

C In dismissing the bank's claim, the sessions court judge in his grounds of judgment at pp 42–43 of the record said as follows:

> Di dalam kes kita bukan sahaja ada arahan 'stop payment' daripada PW4 malahan arahan itu telah dimasukkan ke dalam komputer. Tambahan lagi akaun PW4 tidak ada cukup wang untuk membayar cek P1 itu. Namun D demikian, En Mohd Nor bin Ludin iaitu teller bank plaintif telah menjelaskan bayaran cek tersebut. Tindakan En Mohd Nor bin Ludin ini bukan merupakan satu kesilapan tetapi adalah satu kecuaian atau seolah-olah disengajakan. Encik Mohd Nor bin Ludin mempunyai pengetahuan yang cukup bila beliau mendapati akaun itu tidak cukup wang dan pengurus bank plaintif telah mengarah bayaran diberhentikan.
>
> E Setakat keterangan saksi-saksi yang ada mahkamah ini memutuskan bahawa cek P1 telah dijelaskan bayarannya bukan atas satu kesilapan seperti yang tertakluk di bawah s 73 Akta Kontrak 1950. Adalah diputuskan juga bahawa plaintif gagal melepaskan beban pembuktian yang terletak di bahu mereka terutama apabila mereka gagal memanggil En Mohd Nor bin Ludin iaitu orang yang bertanggungjawab membuat bayaran cek P1 itu. Tidak ada F alasan kenapa plaintif gagal memanggil saksi ini dan tanpa ragu-ragu saya memakai perenggan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak plaintif. Saksi ini adalah terpenting bagi kes plaintif kerana hanya saksi ini yang dapat membuktikan atau menjelaskan apakah alasan sebenarnya cek P1 itu telah dibayar. Tanpa saksi ini, plaintif gagal mengemukakan keterangan yang matan mengenai apa kesilapan yang telah dilakukan yang G mereka gantungkan untuk berjaya di dalam tindakan ini.

The main ground of appeal by the bank is that the sessions court judge had erred in law in failing to apply correctly the legal principle relating to the recovery of money paid by mistake under s 73 of the Act.

H It is the contention of En Chan Chong Choon, counsel for the bank that the money in the cheque was not legally due to the respondent at the time of the payment on 10 December 1992 on the ground that on 4 December 1992 the payment of the cheque had been effectively countermanded by PW4 under s 75(a) of the Bills of Exchange Act 1949 which provides that:

I > The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by —
>
> (a) countermand of payment; ... .

Therefore, the bank had no duty and authority to pay the cheque to the respondent. According to counsel, the respondent had no authority to receive the proceeds. The bank had no mandate from PW4 when the cheque was paid to the respondent on 10 December 1992. Thus, the mistake was the payment of the cheque to the respondent on 10 December 1992 when the cheque had been countermanded by PW4 on 4 December 1992.

Encik Arjan Persumal, counsel for the respondent on the other hand, supported the finding of the judge and submitted that the cheque was paid by negligence and without due diligence on the part of the bank. He argued that the bank owed a public duty to be careful. The respondent could not be blamed for the mistake as the cheque was due to the respondent as part payment of the purchase of shares by PW4 and Robert. As such, there was consideration for the cheque issued. Money paid with full knowledge of countermand and insufficient funds in PW4's account to cover the cheque, cannot be recovered and counsel cited *Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd* (1928) 45 TLR 134, in support.

In order to resolve the rival arguments, I deem it necessary to consider s 73 of the Act which reads:

> A person to whom *money has been paid*, or anything delivered, *by mistake* or under coercion, *must repay* or return it. (Emphasis added.)

The provisions of our s 73 are in pari materia with s 72 of the Indian Contract Act 1872. The Indian section was considered by the Privy Council in *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi & Anor* (1949–50) 75 LR 244 at p 254 to mean:

> Payment by mistake in s 72 must refer to a payment which was *not legally due and which could not have been enforced*: the 'mistake' in thinking that the money paid was due when in fact it was not due. Accordingly, where there was not sufficient evidence to show why the lessee under a mining lease had made over-payments of royalties to the lessor, but the money was paid under the mistaken belief that it was legally due, that was sufficient to bring the case within s 72 of the Indian Contract Act and to entitle the lessee to recover by adjustment or set off the sum overpaid.
>
> It is not to be implied that every sum paid under mistake is recoverable no matter what the circumstances may be; there may be in a particular case circumstances which disentitle a plaintiff by estoppel or otherwise. (Emphasis added.)

The decision of the Privy Council in *Sri Sri Shiba Prasad Singh* was adopted and applied by the Indian Supreme Court in *The Sales Tax Officer, Banaras & Ors v Kanhaiya Lal Makund Lal Sarat* AIR 1959 SC 135. NH Bhagwati J at p 143 said:

> If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like.

In the leading case of *Kelly v Solari* [1835–42] All ER Rep 320, the English Court of Exchequer had held that money paid by directors of an insurance company on a policy which had lapsed by reason of non-payment of premiums could be recovered even though the means of knowing that the policy had so lapsed was available to the plaintiff. According to Parke B in that case at p 322, the money could be recovered, however careless the party paying might have been in omitting to use due diligence to inquire into the fact.

The law on the recovery of money paid by a banker under a mistake of fact was reviewed by Robert Goff J in the English case of *Barclays Bank Ltd v WJ Simmsson & Cooke (Southern) Ltd & Anor* [1980] 1 QB 677. In that case the bank had overlooked the stop payment instruction of its customer in respect of a cheque but nevertheless, proceeded to honour the cheque. In allowing the banks' claim against the payee of the cheque, Goff J after a detailed analysis of the law deduced the following principles at p 695 that:

> (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.
>
> (2) His claim may however fail if:
>
> (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or
>
> (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorized to discharge the debt; or
>
> (c) the payee has changed his position in good faith, or is deemed in law to have done so.

His Lordship went on to state the position of a bank which pays a cheque under a mistake of fact at p 700:

> ... In such a case, the crucial question is, in my judgment, whether the payment was with or without mandate. The two typical situations, which exemplify payment with or without mandate, arise first where the bank pays in the mistaken belief that there are sufficient funds or overdraft facilities to meet the cheque, and second where the bank overlooks notice of countermand given by the customer. In each case, there is a mistake by the bank which causes the bank to make the payment. But in the first case, the effect of the bank's payment is to accept the customer's request for overdraft facilities; the payment is therefore within the bank's mandate, with the result that not only is the bank entitled to have recourse to its customer, but the customer's obligation to the payee is discharged. It follows that the payee has given consideration for the payment; with the consequence that, although the payment has been caused by the bank's mistake, the money is irrecoverable from the payee unless the transaction of payment is itself set aside. Although the bank is unable to recover the money, it has a right of recourse to its customer. In the second case, however, the bank's payment is without mandate. The bank has no recourse to its customer; and the debt of the

customer to the payee on the cheque is not discharged. Prima facie, the bank is entitled to recover the money from the payee, unless the payee has changed his position in good faith, or is deemed in law to have done so.

In the present case before me, the sessions court judge found on evidence that there was a countermand in respect of the cheque and the cheque was cleared not by reason of mistake under s 73 of the Act but by reason of negligence committed by the bank teller Mohd Nor bin Ludin. Since the teller was not called to give evidence, the judge drew an adverse inference against the bank under s 114(g) of the Evidence Act 1950, and thereby dismissed the bank's claim.

In my judgment, the dismissal of the bank's claim is wrong in law. Section 73 of the Act is applicable in this case. The trial court had accepted that there was a countermand. Here, the countermand instruction by PW4 is valid and effective in law, even though it was given orally (see *Chua Neoh Kow v Malayan Banking Bhd* [1986] 2 MLJ 396. Since the countermand was validly made before the payment, the bank's payment to the respondent therefore, is without mandate. Accordingly, the bank has no recourse to its customer PW4, and the debt of PW4 to the respondent on the cheque is not discharged. Prima facie, the bank is entitled to recover the money from the respondent. Thus, neither the knowledge by the bank of the insufficient funds in PW4's account to cover the cheque nor the mistake due to the negligence of the bank in paying the cheque is a bar to the bank's claim under s 73 and under the common law on 'money had and received'.

On the evidence adduced, it is proved conclusively by PW1 and PW3 that the cause for the mistake in the payment of the cheque was due to the bank in overlooking the countermand instruction of PW4 before payment. PW1's and PW3's evidence on this point had not been challenged in cross-examination. The respondent did not put or suggest to the bank's witnesses at the trial that the mistake in payment of the cheque was due to the negligence of the teller. Since the point was of such critical importance to the respondent, it ought to have been put to the bank's witnesses during the cross-examination. Failure to do so would mean that the evidence given in examination-in-chief is regarded as proved. Accordingly, the judge should have ignored the point that mistake in payment of the cheque was due to negligence of the bank (see *Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investment Sdn Bhd* [1996] 2 MLJ 596). Furthermore, s 134 of the Evidence Act 1950 provides that 'no particular number of witnesses shall in any case be required for the proof of any fact'. It is trite law of evidence that 'evidence has to be weighed and not counted' (see *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals* [1995] 2 MLJ 493 at p 519). Therefore, the evidence of PW1 and PW3 that the cheque was paid due to the overlooking of the countermand instruction cannot be disbelieved and disregarded on the facts of this case. Thus, the judge had erred in law in holding that the payment of the cheque was due to the negligence of the bank on a very simple approach that the teller was not called as a witness by the bank. Indeed, there is no evidence whatsoever to show that the mistake in paying

A the cheque was due to the negligence of the bank. The issue of negligence was raised by the respondent and therefore the legal burden of proof is on the respondent and not the bank. By holding that the bank was negligent in paying the cheque, the judge had placed the burden of proof of the bank's negligence on the bank itself, which is wrong in law. The burden is on the respondent and not the bank to prove the negligence of the bank in B paying the cheque. That being so, the finding of the judge that mistakes under s 73 of the Act did not apply on the facts of this case is erroneous and perverse.

The provisions of s 73 of the Act are very clear without any exception that the payee must repay the money which has been paid by mistake. It C is settled law that in an action for the recovery of money paid under mistake, the bank's negligence is irrelevant. The Australian case of *Commercial Bank of Australia Ltd v Younis* [1979] 1 NSWLR 444 expressly held on the authority of *Kelly v Solari* that the bank's negligence did not affect its right to recover money paid in mistake. The relevant part of the D decision in *Younis*' case was cited in *The Law Relating to Banker and Customer in Australia* (Vol 2) (The Law Book Co Ltd,1990) at p 6735 that:

> (a) in order to recover moneys paid in mistake was fundamental to the payment, even though the payer would not been liable to pay if the supposed fact had existed ...
>
> E (b) to hold otherwise in a case like the present would lead to injustice, because if the bank could not recover from (the payee) he would be unjustly enriched at the bank's expense; ...
>
> (d) it was irrelevant:
>
> (i) that if the bank had an obligation it was to (the customer) and;
>
> (ii) that (the customer's) account was overdrawn;
>
> F (e) the bank's negligence did not affect its right to recover ... .

The other cause of action of the bank against the respondent is in respect of 'money had and received' under the common law. Unfortunately, the judge did not consider this alternative cause of action at all in his judgment.

G The rationale in an action for money had and received was established by Lord Mansfield 238 years ago in *Moses v Macferlan* (1760) 2 Burr 1005. The relevant part of the judgment was quoted in *Chitty on Contracts, General Principles* (27 Ed) (Vol 1) (Sweet & Maxwell, 1994) at p 1388:

> H This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial and therefore much encouraged. It lies for money which, ex-aequo et bono, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty; .... [T]he gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

I Lord Wright had also stated in the House of Lords case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 that a person should be prevented from retaining the money derived from another which is against conscience that he should keep. In the present

case, the evidence clearly shows that the respondent had received the payment of RM25,000 from the bank. The sum was not legally due to the respondent as the cheque had been countermanded by PW4 before payment. The bank had no mandate from PW4 to pay the cheque to the respondent and the respondent had no authority to receive the money (see s 75(a) of the Bills of Exchange Act 1949). The bank did not intend the respondent to retain the money or any part at all. There is a total failure of consideration on the part of the bank to make the payment to the respondent.

In the particular circumstances of this case, it is not right for the respondent to keep the money. He is bound by the ties of natural justice and equity to refund the money to the bank. There is no evidence to show that the respondent had altered his position in a manner rendering it inequitable that he should repay the money. The respondent had not acted in good faith when presenting the cheque for payment when he was asked by PW4 not to present the post-dated cheques. The respondent had also made a similar claim of RM25,000 against PW4 in the High Court. He would be unjustly enriched at the bank's expense if the bank could not recover from him. The dispute between the respondent and PW4 relating to payment of the post-dated cheques could be resolved on its merit in the civil suit. The respondent will not be prejudiced if ordered to repay the sum of RM25,000 as he has recourse in the suit.

For the reasons stated above, I allow the appeal with costs and order that the decision of the judge be set aside and enter judgment for the appellant as prayed in its statement of claim. The deposit paid into court by the appellant is hereby ordered to be refunded.

Appeal allowed with costs.

Reported by Kevin Ooi